

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

In re: GUIDANT CORP. IMPLANTABLE
DEFIBRILLATORS PRODUCTS
LIABILITY LITIGATION

MDL No. 05-1708 (DWF/AJB)

This Document Relates to:

Steve Gaydos and Diane Gaydos,
as Husband and Wife,

Plaintiffs,

v. Civil No. 06-32 (DWF/AJB)

Guidant Corporation,

Defendants.

ORDER

Carlos Raul Diez-Arguelles, Esq., Martinez, Manglardi, Diez-Arguelles & Tejedor,
counsel for Plaintiffs.

James B. Murphy, Jr., Esq., Scott W. Anderson, Esq., and Timothy A. Pratt, Esq., Shook
Hardy & Bacon LLP; and Joseph M. Price, Esq., Faegre & Benson LLP, counsel for
Defendants.

Plaintiffs Steve and Diane Gaydos (collectively, Gaydos) filed a motion entitled
“Motion to Reopen Case and For Relief from Judgment/Order” pursuant to Rule 60 of the
Federal Rules of Civil Procedure, seeking relief from this Court’s July 3, 2006 Order. In
that Order, the Court granted Guidant Corporation’s Motion to Dismiss for Failure to
Comply with the Court’s January 31, 2006 Order and dismissed Gaydos’s Complaint
with prejudice. For the reasons set forth below, the Court denies Gaydos’s Motion.

BACKGROUND

On January 6, 2006, the Court entered Pretrial Order (PTO) No. 2 in the MDL action, in which the Court approved a form for plaintiff's fact sheet (PFS). In that Order, the Court also required Plaintiffs' Liaison Counsel (PLC) to work with the Clerk of Court to ensure that a Master Service List of counsel was established and kept current and that individual plaintiffs' counsel familiarize themselves with the Local Rules for the District of Minnesota and obtain a CM/ECF login and password. Moreover, Attachment A to PTO No. 2 explicitly required counsel to enter a notice of appearance and provide a current email address to the Court. On January 31, 2006, the Court specifically entered PTO No. 2 in this action.

On that same day, the Court entered PTO No. 5, requiring all plaintiffs whose cases were initiated or transferred prior to the January 31, 2006 Order to submit a PFS no later than 30 days after entry of the Order. Therefore, Gaydos's deadline for submitting his PFS was March 2, 2006. He failed to do so. At the April 19, 2006 Status Conference, Guidant informed the PLC about the failure by certain plaintiffs to complete their PFSs. On April 21, 2006, Guidant sent a follow-up letter to the PLC listing all of the plaintiffs, including Gaydos, who had failed to submit sufficient PFSs and requesting that these plaintiffs complete their PFSs "within one week of [the letter]."

On April 26, 2006, a representative from the PLC sent a letter and provided a copy of Guidant's April 21 letter to Gaydos's counsel. On April 27, 2006, Gaydos sent an unsigned letter to Guidant, stating "this letter will serve as Plaintiff's completion of Fact Sheet as required by Pretrial Order No. 5." The letter contains the following information

about Steve Gaydos: name, date of birth, current age, implant date, implant unit, and a three-sentence “facts” section. It makes no mention of Diane Gaydos and did not provide any completed medical authorization forms.

On May 4, 2006, Guidant filed a Motion to Dismiss for Failure to Comply with the Court’s January 31, 2006 Order. Shortly after the Motion was filed, a representative from the PLC contacted Gaydos and told him that he PFS was insufficient. On May 5, 2006, Gaydos sent a PFS to Guidant, in which he failed to fill out Sections II (Personal Information), III (Marital Status), and VII (Alleged Injuries, Illness, and Damages), and he did not completely fill out Sections I (Case Information); V (Your Medical History), Section VI (Other Medical Information), and VIII (Loss of Income).¹ He also submitted unsigned medical authorization forms and failed to produce documents required by Guidant. According to Gaydos, the May 5 PFS was “a fully executed supplemental PFS.”

On May 16, 2006, a representative from the PLC contacted Gaydos, stating that Guidant had told the PLC that Gaydos had filled out the PFS, but not the medical authorization forms. On May 24, 2006, Gaydos sent Guidant a restricted medical authorization form, stating that information could only be requested from 1999 to the present and that no military or combat records could be requested. That form also lacked a second signature, required for the release of information relating to substance abuse,

¹ Gaydos submitted a version of this PFS to the Court. In that version, he did not include Sections II and III; thereby, making the May 5, 2006 PFS appear more complete than it actually was.

mental health, and HIV. On June 6, 2006, Guidant sent Gaydos a 10-page letter, listing all of the questions Gaydos failed to answer and requesting that he provide a fully executed, court-approved medical authorization form. On June 23, 2006, Gaydos provided a few, but by no means all, of the answers requested and again failed to submit a completed medical authorization form. On July 3, 2006, the Court granted Guidant's Motion to Dismiss and dismissed Gaydos's Complaint with prejudice.

On August 10, 2006, Gaydos contacted Guidant, asking whether he had completed all of the necessary PFS requirements. On August 22, 2006, Gaydos asserts that he learned for the first time that his case had been dismissed, when he received a letter from the PLC, forwarding Guidant's letter dated August 17, 2006. He contacted Guidant and explained that he has "made every effort to comply with any and all Court Orders in this matter," he did not receive the Motion to Dismiss, and had completed the PFS and medical authorization forms.

On August 25, 2006, Gaydos filed a motion for relief from the July 3, 2006 Order. On August 28, 2006, Gaydos sent Guidant a copy of the June 23, 2006 PFS. On August 31, 2006, Gaydos submitted an untimely affidavit, asserting for the first time that the reason he had no notice of the Court's Orders or of Guidant's requests for information was because the Court and Guidant were sending emails to the wrong email address. Pursuant to the Court's directive, Guidant submitted its opposition on September 8, 2006. Gaydos then filed a reply brief on September 12, 2006.²

² In doing so, Gaydos continued to demonstrate his unfamiliarity with the Court's Orders in this matter. *See, e.g.*, PTO No. 2 and PTO No. 16 (requiring counsel to send
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DISCUSSION

Gaydos makes his request pursuant to Rule 60(b)(1) and (6), under which a district court may grant relief from a judgment on the grounds of “mistake, inadvertence, surprise, or excusable neglect” or for “any other reason justifying relief from the operation of the judgment.” Fed. R. Civ. P. 60(b)(1) and (6). Gaydos has not alleged any claims of mistake, inadvertence, or surprise. Therefore, the Court first focuses on whether there was excusable neglect by Gaydos.

The term “excusable neglect” in this context is generally “understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.” *Union Pac. R.R. v. Progress Rail Servs. Corp.*, 256 F.3d 781, 782 (8th Cir. 2001) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 394 (1993)). To be excusable, however, the neglect must be accompanied by a showing of good faith and some reasonable basis for not complying with the rules. *Ivy v. Kimbrough*, 115 F.3d 550, 552 (8th Cir. 1997). It is generally held that “excusable neglect” under Rule 60(b) does not include ignorance or carelessness on the part of an attorney. *Hunt v. City of Minneapolis*, 203 F.3d 524, 528 n.3 (8th Cir. 2000). Neither a mistake of law nor the failure to follow the clear dictates of a court rule constitutes excusable neglect. *See Ceridian Corp. v. SCSC Corp.*, 212 F.3d 398, 404 (8th Cir. 2000). In deciding whether to set aside a judgment for “excusable neglect,” a district court

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two courtesy copies of all documents filed to the Court and all proposed orders to be unsigned.)

makes an equitable decision taking into account all of the relevant circumstances surrounding the party's omission. *Id.*

Because ignorance or carelessness by an attorney is not excusable, Gaydos's actions are not attributable to excusable neglect. PTO No. 5 clearly required Gaydos to file a PFS within 30 days of his being transferred to the District of Minnesota. He failed to do so. Gaydos claims that he did not receive the Court's and Guidant's emails; yet he acknowledges having knowledge of PTO No. 2 and PTO No. 5 and receiving letters from the PLC and from Guidant. Under PTO No. 2, Gaydos was required to familiarize himself with the Local Rules of the District of Minnesota, including Local Rule 83.5(a) that requires an attorney to update the Court with his or her current contact information, and to fill out a Notice of Appearance. He did neither. Finally, Gaydos had access to the Court's website (www.mnd.uscourts.gov), which has a page dedicated to the Guidant MDL and on which all of the Court's Guidant MDL Orders have been posted. Given these factors, any arguments about not receiving the Court's Orders or the motion to dismiss are unavailing.

Gaydos argues that he used his "best efforts" to complete the PFS and the medical authorization forms as soon as he learned from Guidant that they were deficient. The fact that Gaydos submitted documentation to Guidant in a short time frame does not equate to excusable neglect, especially when that documentation was incomplete and contained unacceptable limitations of scope, in direct contradiction to the Court's Orders. Therefore, having considered these facts, the parties' arguments, and all of the

circumstances, surrounding this matter, the Court finds no grounds for excusable neglect that justify Gaydos's request for relief under Rule 60(b)(1).

Second, the Court considers whether there is "any other reason justifying relief from operation of the judgment." Gaydos argues that the Court should grant his motion on this ground because his PFS is more complete than the PFS in *DeRose*. *See Gary DeRose v. Guidant Corporation*, Civ. No. 06-28 (DWF/AJB), August 16, 2006 Order. In that case, the Court found that, although late, DeRose had substantially complied with the Court's Orders by submitting a substantially completed PFS and signed medical authorization forms. *Id.* Here, the Court's review of the June 23, 2006 PFS and medical authorization form shows that the documents are far from complete. There are substantial blanks in parts, and the authorization forms are, once again, unsigned and restricted. Without more, the Court finds no other reason justifying relief and therefore denies Gaydos' Motion.

CONCLUSION

Contrary to Gaydos's assertion, this is not "simply a discovery dispute." MDL actions require a court to take special measures in an attempt to efficiently run the action and allow it to proceed at a reasonable pace. Here, the Court had enacted measures, including posting the Court's Orders on its website and using CM/ECF to electronically serve counsel with copies of motions and orders. While some exceptionable circumstances may warrant relief under Rule 60, this case does not present such circumstances. Counsel's failure to update his contact information with the Court does

not equate to excusable neglect, and incomplete submissions, no matter how numerous, will never justify relief under Rule 60.

The PLC is reminded of its very important communication role in this matter. The Court assumes that all PLC representatives will do their utmost to communicate often and accurately with plaintiffs' counsel about any potential dispute. Guidant, for its part, is expected to continue its practice of communicating both with plaintiffs and the PLC about specific deficiencies in PFSs, medical authorizations, and document productions.

Therefore, for the reasons state above, **IT IS HEREBY ORDERED:**

1. Plaintiffs Steve Gaydos and Diane Gaydos's Motion to Reopen Case and For Relief From Judgment/Order Entered on July 3, 2006 (Doc. No. 10) is **DENIED**.

Dated: September 14, 2006

s/Donovan W. Frank
DONOVAN W. FRANK
Judge of United States District Court